

# ARKANSAS SUPREME COURT

No. CR 08-45

ANTHONY D. WHITE  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered February 28, 2007

PRO SE MOTION FOR BELATED  
APPEAL [CIRCUIT COURT OF  
GRANT COUNTY, CR 2005-85,  
HON. PHILLIP H. SHIRRON,  
JUDGE]

REMANDED TO SETTLE THE  
RECORD.

## PER CURIAM

A jury found petitioner Anthony D. White guilty of possession of cocaine, simultaneous possession of drugs and firearms, and possession of a firearm by a felon and sentenced him to an aggregate term of 1320 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *White v. State*, CACR 06-799 (Ark. App. Apr. 25, 2007). Petitioner timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied by order entered on August 20, 2007.

Following the entry of that order, the partial record before us indicates that petitioner filed in the trial court a motion to modify, which requested rehearing of certain issues despite the prohibition in Ark. R. Crim. P. 37.2(d) against consideration of such a request. The trial court denied that motion, and petitioner filed a notice of appeal for the order entered on August 20, 2007. Each of these entries in the record bear a file mark of September 25, 2007.

Petitioner now brings this motion for belated appeal, seeking our permission to proceed with

his appeal. A petitioner has the right to appeal a ruling on a petition for postconviction relief. *See Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (per curiam). However, along with that right goes the responsibility to timely file a notice of appeal within thirty days of the date the order was entered in accordance with Ark. R. App. P.–Civ. 4(a). If a petitioner fails to timely file a notice of appeal, he may move this court to file a belated appeal in accordance with Ark. R. App. P.--Crim. 2(e).

In his motion, petitioner contends that the circuit clerk received both his motion for rehearing and the notice of appeal of the August 20, 2007, order on September 12, 2007, but delayed filing those documents until September 25, 2007. He attached copies of a receipt showing delivery on that date as evidence of his claim. We also note that the signature on the order is dated September 24, 2007. While the motion could have been received at the judge's office separately prior to filing, these facts raise sufficient question concerning the record that we remand to settle the record.

On remand, the trial court is instructed to conduct a hearing to determine whether the file mark on the notice of appeal was a clerical error and incorrect, and, if so, the correct date of filing. As the party challenging the file mark, petitioner carries the burden to show by a preponderance of evidence that the filing date affixed was not correct. *See State v. Thurman*, 305 Ark. 448-A, 809 S.W.2d 821 (1991) (per curiam). The circuit clerk is directed to prepare and provide a transcript of that hearing, along with any nunc pro tunc order, when the remand is returned. The remand is returnable within sixty days of the date of this opinion.

Remanded to settle the record.